No. 80-1199

IN THE

Supreme Court of the United S

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,

v.

JOHN PATTERSON, *et al.*

AMERICAN BRANDS, INC.,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSIO

ON WRIT OF CERTIORARI TO THE UNITED STATE
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS JOHN PATTERS

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QUESTIONS PRESENT

1. Whether a seniority
tuted by an employer and un
effective date of Title VII i
§ 703(h) where the system pe
employer's and the union'
intentional discrimination.

2. Whether a requirem
service in a line of progres
as a prerequisite for eligibil
higher-rated jobs in the line,
"seniority system" within th
§ 703(h) where satisfaction of
ment is not determined by ar
time served in employment.

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THE AMERICAN TOBACCO COMPANY, et al.,

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EQUAL EMPLOYMENT OPPORTUNITY COM

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On Writ Of Certiorari To Th
United States Court of Appea
For The Fourth Circuit

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BRIEF FOR RESPONDENTS JOHN PATTERSO

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STATEMENT OF THE CASE

These consolidated employment d
ination cases concern the applicat

§ 703(h) of Title VII of the Civi
Act of 1964, 42 U.S.C. § 2000e-2
seniority systems or lines of pro
instituted after the effective dat
Act.

A. Proceedings Below

This litigation began in 196
John Patterson and other black e
filed administrative charges a
discrimination by the company[1/]
union[2/] at three American Tobacco

1/ In this brief, "company" ref
lectively to the American Tobacco
a Division of American Brands, Inc.
American Brands, Inc.

2/ In this brief, "union" refers
tively to the Tobacco Workers I
tional Union and Local 182, Tobacco
International Union. The brief
union petitioners states that, in 1
Tobacco Workers International Unio
with the Bakery and Confectionary
International Union to form the

facilities in Richmond, Virgi
6).[3] In 1973, the employe
class action in the district c
ing the company and the union
discrimination in violation of
the Civil Rights Act of 1964
§ 2000e et seq., and the Civil
of 1866, 42 U.S.C. § 1981.
This action was consolidated fo
a subsequent Title VII action,
Equal Employment Opportunity
alleging both race and sex dis

2/ cont'd.

Bakery, Confectionary and Toba
International Union. Brief

3/ In this brief, "App." re
joint appendix filed in this C
refers to the joint appendix
court of appeals; "Ex. App." r
joint exhibit appendix filed
of appeals; "Tr." refers to
transcript; and "Pl. Ex." refe
tiffs' trial exhibits.

(App. 3).

Following the trial in
trict court found that the c
union engaged in intentional
discrimination until 1968; t
they continued to discrim
black and female employees
promotions, and job classi
that the company also d
against blacks and women in
of supervisors. (App. 7-11).
Circuit affirmed these find
(App. 75-78, 93-94, 96-97)
Court denied certiorari.

4/ The Fourth Circuit also
some modifications, the reli
the district court (App. 7
104), but held that the EEC
against the union for sex
should be dismissed due t
failure to attempt concili
filing suit. (App. 94-96).

On remand, the compa
filed a motion to vaca
court's 1974 orders and
complaints on the basis
1977 decision in Internat
of Teamsters v. United S
324.[5/] On appeal from the
denial of this motion, a
Fourth Circuit panel he
the case should be rema
findings on whether the
was protected from Titl
by § 703(h) as interpret

5/ The motion also sought
complaints on the basis of
Inc. v. Evans, 431 U.S.
Hazelwood School Dist. v
433 U.S. 299 (1977). The
banc affirmed the distri
of the motion on the Eva
manded the Hazelwood issue
sideration. (App. 146-5
for certiorari was filed
these issues.

(App. 117-18). The pan
from the scope of th
seniority aspects of th
tional practices, inc
lines of progression.
§ 703(h) could not im
of progression from li
were not part of a "
within the meaning of
116).

On rehearing en
agreed with the panel
quired a remand for
and a new determinatio
of the seniority syste
However, the en banc ma
the question whether th

6/ No petition for c
with respect to this is

sion were part of

Instead, the en ban

fact that the line

instituted in 1968

the lines were consi

ity system, § 703(h

the system was estab

tive date of Title

The question now bef

concerns the appli

seniority systems o

which were institut

and which perpetu

discrimination.

7/ This issue was n
any party in the di
either the panel or
appeals.

B. Discrimi

1. Befo
tion

These ca
practices at thre
Tobacco Company i
Virginia: the "V
manufactures ciga
branch," which ma
and the "Richmond
accounts and reco
(App. 16-17, 75).
and the Richmond
into two producti

8/ The distric
company discrimina
and sex in filling
the Richmond offi
Fourth Circuit aff
96-97). The compa
ruling in its seco
or in the present

along racial l

prefabricati

prepare tobacc

the predominan

ments manufac

(App. 18, 34,

Union is the b

hourly product

in both depa

(App. 17).[10/]

Until 196

maintained a

9/ The bran
tifiable. T
substantially
employees and
Virginia branc

10/ Other e
local unions
tional Brothe
and the Inte
Machinists an
17). Those u
lawsuit.

departmental

race. As

> Be
> company
> by race
> ments,
> and pla
> were re
> Tobacco
> while
> sented

(App. 75).

lower payin

while jobs

reserved fo

made on the

and employee

11/ White e
the best pa
departments
ees held so
cleaning job
ments. (Ex
there was a
ment at the
job classifi
cleaner and
33).

department to another without forfeiting seniority. (App. 75). Job classifications were segregated by sex as well as race. (App. 43-46). The company appointed only white males to supervisory posts. (App. 96).

2. 1963-1968: Continuing Intentional Discrimination

In 1963, under government pressure,[12/] the segregated locals were merged and the departmental seniority system was replaced with a branch seniority system. (App. 75). However, as the district court

---

12/ The president of Local 182 testified that "we were informed by the Defense Supply Agency that if we continued to maintain segregated local unions, then the Defense Supply Agency may have to step in and say we will cancel all government contracts with the American Tobacco Company, which if this would have happened would have meant detrimental loss to our membership." (J.A. 202).

and the court of appeals held, intentional discrimination continued. Although the departmental seniority system was no longer in effect at the Virginia branch, blacks were now denied access to better jobs on the basis of unwritten, subjective selection procedures administered by white supervisors. (App. 75-76).[13/] Despite the change in the form of the seniority system, employees with the greatest branch seniority were not promoted to automatic machinery jobs in the fabrication department unless the supervisors determined they were "qualified." (App. 28, 76). Supervisors canvassed employees to determine their interest in potential vacancies.

13/ There were 71 supervisory employees at the Virginia branch in 1969. The number of black supervisors increased from only one in 1963 to only three in 1969. (App. 34).

(App. 28). An employee was deemed "quali fied" if he or she "had filled a particula job before and was, in the opinion o supervisory personnel, familiar with it. (App. 28). Since all but a token number o blacks had not been permitted to hold thes jobs on either a permanent or a temporar basis[14/] up to that time, very few blac employees were deemed "qualified" for thes promotions under the procedures institute in 1963. (Tr. 108-13). Not surprisingly there was an increase of only four blac employees in the fabrication department o

---

14/ Prior to 1963, black employees wer not permitted to fill temporary vacancie in job classifications restricted t whites. (App. 33). Since 1963, employee in the predominantly black prefabricatio departments have generally filled temporar vacancies in those departments, and employ ees in the predominantly white fabricatio departments have generally filled temporar vacancies in those departments. (App 28).

the Virginia branch between 1963 and 19
(App. 76).[15/]

At the Richmond branch, the wh
supervisors[16/] canvassed employees
determine their "interest" in each vacan
A supervisor then selected the most sen
employee deemed by the supervisor to
willing to fill the vacancy. Vacanc
were not posted, and there were no writ
job descriptions. (App. 76). Despite

15/ In 1963, 11.8 percent of the employ
at the Virginia branch (196 of 1,(
employees) were black. (App. 34).
number of blacks in the fabrication depa
ment increased only from 82 in 1963 to
in 1968. (Ex. App. 46-47). In both 1
and 1968, the great majority of bl
employees in the fabrication departm
were assigned to manual labor, cleani
and other non-machine operator jobs. (
App. 46-47).

16/ There were 31 supervisory employees
the Richmond branch in 1973. The fi
black supervisor was appointed in 1966;
second was not appointed until 1971. (A
35).

formal change in 1963 from departmen
branch seniority, there was an incre
only six black employees in the fabri
department of the Richmond branch b
1963 and 1968.[17/] Throughout this p
the company also discriminated again
male employees at both branches.
93-94).

The continuing discrimination a
black and female employees was intent
The courts below held that, while
was no discrimination in hiring after
it was not until 1968 that the compa

17/ In 1967, 32.1 percent of the emp
at the Richmond branch (79 of 246 e
ees) were black. (App. 35). The nur
blacks in the fabrication depar
increased only from 6 in 1963
in 1968. (Ex. App. 48). In both 19
1968, most of the black employees
fabrication department were assig
general labor and other non-machine
ator jobs. (Ex. App. 48).

the union instituted promotional
which were fair even in form.
75-76, 114).

3. 1968 and After: The Line
gression

On January 15, 1968, the
instituted a posting and biddin
for filling vacancies in the
Workers bargaining unit. Und
system, vacancies were posted
bulletin boards for employee bids.
was awarded to the bidder with
branch seniority in the branch co
the vacancy. (App. 21-23). The
court found that this system was
that it needed further impleme
through the posting of written job
tions, and the Fourth Circuit affi
finding. (App. 8-9, 76-78).

The district court also
after January 1968 the comp
union engaged in two other di
practices: (1) continuation of
practice of maintaining a sepa
ity roster for each branch and
inter-branch transfers upon f
accrued seniority; and (2) in
lines of progression which per
effects of the prior intention
nation and segregation. (App
76-77). The Fourth Circuit
remanded this case to the di
for further findings conc
first practice. (App. 145-46)
second practice is before t

The lines of progression
issue here[18/] were not included

18/ The nine lines of progre
follows: (1) packing or mak

uary 1968 collective bargain

(See Pl. Ex. 35FF-4). Rathe

were established by the compa

1968 (J.A. 570), and were r

union in 1969. (J.A. 245-47).

18/ cont'd.

operator or Schmermund boxe
learner adjuster; (2) catche
making; (3) line searcher-Sc
to examiner-packing; (4) b
to turbine operator; (5) le
to adjuster; (6) making o
juster to overhaul adjuster;
helper-prefabrication to adju
cation; (8) assistant adt dry
adt dryer operator; (9) ass
dryer operator to textile d
(App. 21-22). The courts b
the lines leading to adjus
adjuster, and adjuster-prefa
justified by business necess
fore are lawful despite the
tory effect on blacks and
31-32, 79).

19/ Both the company and th
lated in their joint petit
tiorari that, "[s]olely fo
this petition, petitioners t
of progression as having co

of all hourly paid non-c

the two branches hold job

progression.[20/] Each lin

19/ cont'd.

tence after Title VII's
Pet. at 5 n.5. The ma
the en banc court below
line-of-progression polic
January 1968. (App. 143)
opinion questioned whethe
complete on this factual
edged that "the majority
effect of § 703(h) on
gression within the sen
based entirely on the fa
did not exist in 1965."
dissenting judges would
case for factual findings
the lines of progression.

20/ Each line of progres
two or three job class
Company Brief at 4 n.7.
combined total of 952 hou
employees at the Virgi
branches, approximately
the relatively small numb
tions included in the lin
These 646 employees hold
of the highest paid jobs
(Ex. App. 158-62).

traditionally segregate
seven white lines of
two black lines of p
jobs in the white line
more than the jobs in

21/ The lines leading
examiner-making, examin
operator, adjuster, ove
adjuster-prefabricati
jobs held almost excl
In 1968, only one bla
top job in any of thes
46-48). By 1973, there
black employee in a top
120 white employees in
lines of progression.
mately 641 employees he
lines in 1973. (Ex. Ap

22/ The jobs of assis
ator, adt dryer opera
tile dryer operator,
operator have never
employees. (Ex. App.
total of five black em
ginia branch held all t
lines of progression.

23/ The top jobs in
among the highest pai
jobs at both branches
black lines pay substa
App. 155-62).

The great majority
the lines of progre
employees at the t
the fabrication dep
branch. (App. 78-7

When a vacanc
top jobs in a li
employees who have
line are eligible
(App. 21-22). Amon
promotion is not
seniority in the lo
the line of progre
seniority control

24/ As late as 19
jobs were held by
and only 61 blacks.
these jobs were a
while only 27 of
Richmond branch.

25/ The company an
edly acknowledged t
used for advancemen

of prior service

of progression t

25/ cont'd.

progression. For
in the court of
described the op
progression in th
these lines of
employees in the j
ately below the
employee with th
[i.e., branch] se
motion." Joint Br
Co. and American B
1263, at 13. Se
Reply Brief of
American Brands,
at 18 ("employees
of progression ba
ity, not date of
progression"); Jo
ing of American
Brands, Inc., No
("plant-wide sen
obtain an entry
of progression a
line"); Joint Br
Co., American Bran
International Uni
Nos. 78-1083/108
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could bid, altho

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The lines

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Brands, Inc.,
Union, and Lo
Responses to
78-1083/1084,
siderable sup
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banc majority
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(App. 142-43 n

employees
to traditio
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determinatio
cations," wh
departmental
turn repla
progression.
excluded fr
race now we
not held the
not be permi
ing white jo
sion. (App.
denied equa
93). The d
that the li
past discri
and sex. (Ap

lines were justified by business necessity and therefore were upheld despite their perpetuation of past discrimination,[26/] the remaining lines were not supported by any adequate business justification and were unlawful. (App. 31-32). As the Fourth Circuit stated in affirming these findings:

> Most of these jobs [in the lines of progression] were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its

---

26/ The court held that the lines leading to adjuster, overhaul adjuster, and adjuster-prefabrication were justified by business necessity. (App. 31-32). In 1973, the top jobs in these lines were held by 80 employees, all of whom were white. (Ex. App. 158-62).

> evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity. For the others, alternative means such as on-the-job training are available to provide competent workers.

(App. 78-79) (footnote omitted).

The record provides ample support for these findings. By 1973 -- five years after the lines of progression were instituted -- rigid segregation of job classifications continued to characterize both branches. (App. 78). Whites still held all but one of 121 jobs at the top of the seven white lines of progression; the lone exception was a single black learner adjuster. (Ex. App. 158-62). White employees also continued to dominate the lower jobs in these lines: whites held approximately 465 of these jobs, while blacks held only 55. (Ex. App. 158-62). Moreover, of

approximately 200 hourly paid non-craft j
classifications at the Virginia branch,
had never been held by whites and
had never been held by blacks. Of approx
mately 43 such classifications at t
Richmond branch, 21 had never been held
whites and nine had never been held
blacks. (App. 78). Finally, the prefa
rication department at the Virginia bran
remained more than 80 percent black, whi
the fabrication department was still
percent white. The prefabrication depar
ment at the Richmond branch remain
92 percent black, while the fabricati
department was 62 percent white. (Ap
77). It is therefore clear from the reco
that the lines of progression and oth
post-1968 practices perpetuated the ove
segregation and intentional discriminati
of the past.

SUMMARY OF THE ARGUMENT

The historical evidence establish
longstanding pattern of segregation
discrimination against black worker
the tobacco industry. In keeping with
racial policies of the industry, both
company and the union in this case
operated on a strictly segregated b
until 1963. The system of overt job
departmental segregation was then repl
by a system of intentional discrimina
in promotions. Under the guise of ev
ating "interest" in vacancies and "qual
cations" for promotions, white supervi
restricted black employees to historic
black jobs. This intentionally discr
natory promotional system continued u
1968, three years after the effective
of Title VII, when it was replaced

system based on lines of progressio
line-of-progression system, superimp
the pre-existing pattern of rigid s
tion and intentional discriminatio
perpetuated the racially exclusionar
cies of the past by continuing t
black workers access to historicall
jobs at the top of the pay scale.

The legislative history of Ti
and the prior decisions of this
establish that § 703(h) was not i
to protect such post-Act systems.
§ 703(h) provides a narrow exemptio
was specifically designed to prote
fide seniority systems which were i
tence before the effective date o
VII. Where, as here, an employer
union have instituted a system aft
effective date of Title VII which
tuates their own prior intentional d

ination, the system is prohibite
interpretation of Title VII and
accords with the fundamental pu
underlying policies of the Civil R
of 1964.

In addition, the lines of pr
are not part of a "seniority syste
the meaning of § 703(h). Instead
quirement of prior service in a
progression operates as a prerequ
eligibility to bid on higher-rate
the line. Satisfaction of this
site is not determined by seniori
job, or by seniority in the line
gression, or by any other measur
served in employment. Rather,
fact of service in a line-of-pr
job determines eligibility for adv
Among the limited group of empl
satisfy this non-seniority eligib

quirement, branch seniority i
determine the successful bidde
line-of-progression requiremen
of a "seniority system," it is
ed by § 703(h).

ARGUMENT

I. SECTION 703(h) OF TITLE AUTHORIZE THE POST-ACT SENIORITY SYSTEMS WHIC INTENTIONAL DISCRIMI SEGREGATION.

A. Section 703(h) Shou the Context of the islative Materials, cisions of this Co History and Purpose

Section 703(h) of Title
in pertinent part as follows:

> Notwithstandin
> provision of this s
> shall not be an unl
> ment practice for a

> apply different st
> pensation, or di
> conditions, or pri
> ployment pursuant
> seniority or meri
> provided that suc
> are not the resul
> tion to discrimin
> race ....

42 U.S.C. § 2000e-2(h).

Petitioners argue that
guage" of the statute appli
as well as pre-Act seniori
This Court, however, has re
plistic notion that statuto
have a fixed meaning apart f
in which it is used. "It
rule, that a thing may be wi

27/ Respondents submit tha
progression instituted in
"seniority system" or part
system" within the meaning
See Argument II, infra. Fo
of the present discussion, h
dents will refer to the lin
sion as a "seniority system."

of the statute and yet no
ute, because not withi
within the intention
United Steelworkers of
443 U.S. 193, 201 (19
Trinity Church v. United
457, 459 (1892). See als
ling, 144 F.2d 608, 62
aff'd sub nom. Gemsco In
U.S. 244 (1945).

Thus, "'[w]hen aid
the meaning of words, as
tute, is available, the
be no "rule of law" whic
however clear the wor
"superficial examinati
Colorado Public Interes
Inc., 426 U.S. 1, 10 (19
States v. American Truc
310 U.S. 534, 543-44 (1

Old Maxims Never Die
Rule" and Statutory
"Modern" Federal Court
1299 (1975); Frankfur
on the Reading of Stat
Rev. 527 (1947). As
stated in analyzing
National Labor Relatio

> Unlike
> the phrasing
> islation as
> more than a
> of definitio
> relevant ai
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> consideratio
> words acquir
> from the hi
> which they s

Phelps Dodge Corp. v.
185-86 (1941).

Section 703(h) mu
"against the backgrou
history of Title VII
context from which the

Steelworkers v. W

The relevant aids
§ 703(h) -- the le
cerning the statu
of this Court, and
of Title VII -- a
the circumstances
does not immunize a
tem which perpetuat
nation.[28]

B. The Leg
§ 703(h),
sions of
that the
Post-Act
Perpetua
nation ar

Petitioners a
§ 703(h), Congress
Title VII would "

28/ Neither Alex
565 F.2d 1364 (6th

seniority," 110
(remarks of Sen.
"would not affect
7207 (remarks of
Brief at 15-20;
relying on thes
statements in the
tioners have pr
Court held in Fr
tion Co., 424 U.
does affect senic
the effective dat

28/ cont'd.

436 U.S. 946 (1
Workers Local 396
1980), nor any
decisions cited
25-26 n.32) and
discusses the re
rials or the
Title VII. Tho
address the qu

in Franks hel
Congress did
of retroactiv
able victims
424 U.S. at 7
relief ordina
VII, and it
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its effect o
rights of othe
ees. Id. at
431 U.S. at
under Title V
cause the maj
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quoting Uni
Corp., 446 F.

Thus, desp
quoted by pe
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When read in
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§ 703(h) de
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tems which
discriminati

As the
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Rather, con
were focus
"establish
rights would

In its

sters, this Court extensively reviewed the legislative history of § 703(h). As the Court noted in Franks, the initial bill reported by the House Judiciary Committee, H.R. 7152,[29/] did not contain § 703(h) or any other reference to seniority. 424 U.S. at 759. Although the majority Judiciary Committee report did not mention the subject of seniority, the minority report "charged that [the bill] would destroy existing seniority rights." Teamsters, 431 U.S. at 350 (emphasis added) (footnote omitted). See H.R. Rep. No. 914, 88th Cong., 1st Sess. 65-66, 71 (1963) (minority report). Representative Dowdy, a member of the Judiciary Committee minority, argued on the House floor that the bill would require

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29/ H.R. 7152, 88th Cong., 1st Sess. (1963). See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

revision of "established seniority" rights. 110 Cong. Rec. 2726 (1964).[30] He therefore offered an amendment whose purpose was to "make the seniority system or merit system of hiring an exception to the rule of race, color, creed, and so on, in order that an employer may make a hiring decision or determination based on the merit system or seniority system ...." Id. at 2725.[31]

30/ Other members of the House expressed similar concerns. See 110 Cong. Rec. 2557 (1964) (remarks of Reps. Winstead and Ashmore); id. at 2560 (remarks of Rep. Alger).

31/ The Dowdy amendment provided as follows:

> The provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system; (3) a system which predicates its practices upon ability to produce, either in quantity or quality; or (4) a determination based on any factor other than race, color, religion, or national origin.

110 Cong. Rec. 2727-28 (1964).

The Dowdy amendment was defeated without discussion or debate, id. at 2728, and on February 10, 1964, H.R. 7152 passed the House. Id. at 2804-05.

When the bill went to the Senate, it still did not contain § 703(h) or any other reference to seniority systems. Since the bill was not referred to any standing committee but instead went directly to the Senate floor, there is no Senate committee report providing any insight into legislative intent. See Vaas, Legislative History: Title VII, 7 B.C. Ind. & Com. L. Rev. 431, 443-44 (1966) (hereinafter "Vaas"). However, the bill was extensively debated on the floor of the Senate in the course of a prolonged filibuster. The subject of seniority surfaced during this debate. Franks, 424 U.S. at 759. Senate critics of the bill reiterated the fears expressed

by House opponents that Title VII wou
require preferential hiring of minorit
to achieve racial balance, and that t
minorities hired would then be giv
special seniority rights placing th
ahead of incumbent whites.[32/] Suppor
ers of the bill responded that Title
"would not affect" seniority rights,

32/ For example, Senator Hill of Alab
argued that Title VII "would undermine
the seniority system" and "would force
ployers and unions, both, to discrimina
to hire by race ...." 110 Cong. Rec. 4
487 (1964). He asserted that "[r]ac
balance might be required in every posit
.... Race -- not ability, not seniori
and union contracts notwithstanding
would be the first criterion -- the ex
opposite of what the language of the b
apparently says." Id. at 488. As Sena
Hill read the bill, "[n]ondiscriminat
is no longer sufficient; preferenti
treatment is demanded. It is to prefer
tial treatment, as embodied in this bi
that I most vigorously object."

33/ See, e.g., 110 Cong. Rec. 5094 (19
(remarks of Sen. Humphrey).

but opponents continued to argue th
bill "would destroy existing sen
systems ..." Franks, 424 U.S. at 75
phasis added). See also Teamster
U.S. at 350 and n.33.[34/]

It was in response to these
that Senator Clark,[35/] on April 8,
introduced into the Congressional

34/ For example, Senator Stenn
Mississippi asserted that Title VII
"require employment on the basis of
and so forth," and would mandate "[p]
ential advance of minorities so
destroy seniority in employment,
service and apprenticeship programs
110 Cong. Rec. 7091 (1964).

35/ "Bipartisan captains" were se
for each title of the bill in the S
Senators Clark of Pennsylvania and C
New Jersey were the bipartisan ca
responsible for explaining Title
defending it, and leading discussion
during the Senate debate. 110 Cong
6528 (1964) (remarks of Sen. Humpl
Vaas at 444-45. See Teamsters, 431 U
351 n.35.

three documents containing, inte
statements explaining the bill's e
seniority rights. See Franks,
at 759-61; Teamsters, 431 U.S. at
"While these statements were made
§ 703(h) was added to Title VII,
authoritative indicators of that s
purpose." Teamsters, 431 U.S.
These statements unequivocally dem
that the purpose of § 703(h) was t
the bill's opponents that Title V
not require preferential treat
minorities at the expense of se
rights existing at the time Title
effect.

The first of the three docum
troduced by Senator Clark was a s
prepared by the Department of Ju
Senator Clark's request to rebut t

ments made by Senator Hill. 11
7206-07 (1964). See Teamsters,
351 n.36. This statement spec
clared that Title VII would no
vested rights of seniority" an
"no effect on seniority rights
the time it takes effect."
(emphasis added).[36/] The se
ment was an interpretive memora
ted jointly by Senators Clar

36/ The portion of the Justic
statement pertinent to seniori
full:

> First, it has been a
> title VII would under
> rights of seniority. T
> correct. Title VII wou
> effect on seniority rig
> at the time it takes effe
> example, a collective
> contract provides that i
> of layoffs, those who were
> must be laid off first, s
> sion would not be affe
> least by title VII. Th
> true even in the case whe

Id. at 7212-15. This memo
that Title VII "would have
established seniority rights
is prospective and not re

36/ cont'd.

discrimination prior to
date of the title, w
had more seniority t
Title VII is directed
tion based on race, co
sex, or national or
perfectly clear that whe
laid off or denied
promotion because unde
seniority rules he is "l
totem pole" he is not b
nated against because
Of course, if the se
itself is discriminatory
unlawful under title VI
were to state that all N
laid off before any whi
rule could not serve as
a discharge subsequent t
tive date of the title.
how anyone could quarr
result. But, in the o
assuming that seniorit
built up over a period
which Negroes were not
rights would not be set
taking effect of title

Id. at 7213 (emphasis add
document submitted by Se
set of answers to questio
tor Dirksen. Id. at 7215

36/ cont'd.

> ers and labor org
> simply be under a
> criminate against Ne
> their race. Any dif
> ment based on esta
> rights would not be
> would not be forbid

110 Cong. Rec. 7207 (1964

37/ The full text of t
Clark-Case memorandum per
ity states:

> Title VII would
> established seniorit
> fect is prospective
> tive. Thus, for ex
> ness has been discr
> past and as a result
> working force, whe
> into effect the emp
> would be simply to f
> cies on a nondiscrim
> would not be oblig
> permitted -- to fir
> to hire Negroes, or

to a question about

Clark stated that "[t]h

active, and it will not

to change existing seni

7217 (emphasis added).[3]

37/ cont'd.

for future vacanci
are hired, to gi
niority rights at
white workers hi
ever, where waiti
ment or training
effective date o
tained on a discr
use of such list
takes effect may
subterfuge to acc
tion.)

110 Cong. Rec. 7213 (19

38/ Two of the questi
tained to seniority:

Question: Would
prevail in respect
that management f
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tions on the basis
of dismissals? N
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Following the

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number of informal

Senate leadership,

38/ cont'd.

fired." If the
is the employe
contract requi
fired and the
white?

Answer: Sen
way affected b
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Negro happens
he can still b
as it is done
"last hired"
race.

Question: If
to abolish his
of discrimina
seniority?

Answer: The
and it will no
change exist

110 Cong. Rec. 7217

the Attorney Gene
mise substitute
Mansfield and Di
the Senate floor.
11930-34 (1964).
61. See Vaas at
field-Dirksen pr
substitute for
effort to bring
See 110 Cong. Re
language of § 703
ity appeared in
substitute bill.

One of the
compromise substi
the ambiguities i
of H.R. 7152. Te
See 110 Cong. Rec.
of Sen. Dirksen);
Sen. Humphrey).

one of those
VII's impact
gained senior
U.S. at 352
Humphrey expl
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110 Cong. Rec
at 12818-19
There was no
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§ 703(h), sub
the Senate, i

39/ Section
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id. at 1589

July 2, 196

Act of 1964.

Based

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424 U.S. at

39/ cont'd.

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§ 2000e-2(
legislative
Griggs v. D
434-36 (197

Justice Rehnquist, agreed with the majority that "the 'thrust' of that section is the validation of seniority plans in existence on the effective date of Title VII." Id. at 791 (concurring in part and dissenting in part) (emphasis added); see id. at 780 (Burger, C.J., agreeing generally with Justice Powell).

Similarly, in Teamsters the Court found that Congress was concerned with

> Title VII's impact on existing collectively bargained seniority rights. It is apparent that § 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an ex-

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39/ cont'd.

the seniority provision of § 703(h) was largely ignored in the legislative debates, and the statute was characterized almost exclusively as a provision protecting job-related employment tests. See, e.g., 110 Cong. Rec. 15896 (1964) (remarks of Rep. Celler); id. at 16002 (comparative analysis of House and Senate bills prepared by Rep. McCulloch and introduced by Sen. Dirksen).

> plicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. ...
>
> In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. ... [T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352-53 (emphasis added; citations and footnotes omitted).

Thus, as the Court concluded in both Franks and Teamsters, the legislative history of § 703(h) demonstrates that this

section was designed to protect senior
rights acquired prior to the effect
date of Title VII. In United Air Lin
Inc. v. Evans, 431 U.S. 553 (1977),
Court extended this protection to
operation of a pre-Act system that perp
uated the effects of a post-Act discri
natory discharge which was not the subj
of a timely charge by the discriminatee.
Although the system gave present effect
a past act of discrimination, the emplo

> was entitled to treat that past act
> lawful after [plaintiff] failed
> file a [timely] charge of discrimi
> tion .... A discriminatory act wh
> is not made the basis for a tim
> charge is the legal equivalent o
> discriminatory act which occur
> before the statute was passed ..
> [S]eparately considered, it is mer
> an unfortunate event in history wh
> has no present legal consequenc

Id. at 558.

40/ The Court also applied the Evans ho
ing in Teamsters, 431 U.S. at 348 n.

Contrary to the company's ass
tion (Brief at 22-23), Evans does not
§ 703(h) as barring an attack on a sy
which was adopted after the effective
of Title VII.[41/] Rather, Evans holds
a bona fide seniority system in exist
when Title VII took effect may be prote
when it perpetuates either pre-Act disc
ination (which was not illegal) or post
discrimination which was not the subjec
a timely charge (and therefore is the l
equivalent of pre-Act discrimination).
"[t]he statute does not foreclose att
on the current operation of senio
systems which are subject to challeng
discriminatory." 431 U.S. at 560. E

41/ The Fourth Circuit en banc affi
the district court's application of E
to this case. (App. 146-47). The peti
for certiorari did not present this i
for review.

does not discuss the legislative hi
§ 703(h), and it says nothing
seniority system which, although in
after Title VII made it clear that
inatory employment practices were
nevertheless perpetuated the eff
past intentional discrimination an
adequate business justification.
less of when that past discrim
occurred, whether before or af
effective date of Title VII, such
is not protected by § 703(h).[42/]

42/ Petitioners also rely on state
two later opinions that, "absent a
inatory purpose, the operation of a
ity system cannot be an unlawful em
practice even if the system h
discriminatory consequences," Tra
Airlines, Inc. v. Hardison, 432 U.S
(1977), and that "[s]ignificant
must be afforded employers and u
create differing seniority sy
California Brewers Ass'n v. Brya
U.S. 598, 608 (1980). However, t
in Hardison was the extent of an em

In sum, the legislative
demonstrates that the language of
was designed to incorporate the
of Title VII's sponsors that
rights accumulated by whites u
existing bona fide systems wou
overriden by special seniority r
minorities. While recognizing
pre-Act seniority systems may "'c
freeze the status quo of prior di
tory employment practices,'"
nonetheless "extended a measure o
to them." Teamsters, 431 U.S. a

42/ cont'd.

obligation under Title VII to a
the religious observances of its
432 U.S. at 66, and the issue in
Brewers was the definition of
"seniority system" in § 703(h), 4
601. See Argument II, infra.
opinion decides or even discu
question presented here.

quoting Griggs v. Duke Power Co
424, 430 (1971). However, no
legislative history indicates t
had the same solicitude for se
tems instituted after the effec
Title VII, when employers and
on notice of their legal duty
criminate. To the contrary, a
held in Franks, Congress inten
ride post-Act seniority rights
tent necessary to provide a
remedy for discrimination.

C. The Historical Cont
Purpose of Title VII
Court's Prior Anal
Language and Legisl
of § 703(h).

1. The Historical C
Lines of Progre
tuted in 1968 W
posed on a P
Structure of
Discrimination
tion.

The language of Title VII

not only in the context of
history but also in "the his
from which the Act arose."
workers v. Weber, 443 U.S
historical record undergir
shows that, for more than
after the Emancipation Pr
American workplace was marke
practices designed to restr
ers to inferior positions
them altogether from desi
high paying jobs.[43/] These

43/ For a full discussion
of blacks in the American
S. Spero and A. Harris, T
(1931) (Atheneum ed. 1974).
Myrdal, An American Dilemma
(1944) (Harper & Row ed. 19
discussion of black worke
period from World War I th
II is found in R. Weaver,
National Problem (1946), an
labor unions in R. Marsh
and Organized Labor (1965
and V. Briggs, The Negro and

nowhere more prevalent t
industry, in which black
origins in slavery. Both
tobacco industry in the
record in this case[45/] m
the post-Title VII adopti

43/ cont'd.

(1967); and H. Northrup
and the Negro (1944).
discussions, see H. Hill
the American Legal Syst
the Law (1977), and W. Go
in White Unions (1977).

44/ For a thorough disc
tory of blacks in the tob
H. Northrup, The Negro
dustry (1970) (hereinaf
G. Starnes and J. Hamm
Labor Relations in Virgin
(hereinafter "Starnes and
R. Marshall, Labor in th
(1967); H. Northrup, O
the Negro at 102-18; S.
ris, The Black Worker at
The Conflict of Caste and
ican Industry, 42 Am. J.

45/ See pp. 8-27, supra.

ity system" at issue he
racial bars imposed by
union in the past.

Blacks have work
industry since its in
Virginia. H. Northru
Tobacco Industry at 1
"Northrup"); G. Starne
Phases of Labor Relat
37-39 (1934) (herein
Hamm"). Through the
century, when tobacco
concentrated in Virgin
lina, the industry's l
posed almost exclusive
Northrup at 2; Starn
Johnson, The Conflict o
an American Industry,
56-57 (1936) (hereinaft
ing this period, Rich

the center of the
in which masters h
the tobacco manuf
18-19. See also St

For two decad
blacks continued t
supervisory jobs i
the 1880s, however,
were introduced,
remove black hand
jobs and replaced
operators, most of
males were hired
men. Blacks remai
jobs, and white ma
pervisory and whit
at 3, 21-22; Johnso
See Starnes and Ha
number of black wo
tially reduced, ar

segregation whic
the industry was
at 21. This pa
occupational but
blacks were conf
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usually in separ
on separate floo
ments. Id. at 3
Soc. at 59-61.

Blacks conti
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See Starnes and
67. Then, howev
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Johnson, 42 A
at 64-65. Bl
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Starnes and H
and C. Woods
285 (1930).

The Toba
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46/ "In s
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Northrup,
114. Cf. S
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Richmond, i
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tional barrier to opportunities for blacks. Northrup at 38.[47] The unions reinforced the segregated pattern established by the employers, and the Tobacco Workers Union "represented its white members well to the detriment of, and at the expense of, its Negro members." Id. at 39. See R. Mar-

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46/ cont'd.

See Matter of American Tobacco Co., 9 NLRB 579 (1938); 10 NLRB 1171 (1939). Nevertheless, the three white locals at American Tobacco's Durham, Reidsville, and Richmond plants thereafter jointly negotiated one collective bargaining agreement with management, while each of the three black locals made separate agreements. Professor Northrup observed in 1944 that, while "the white leaders usually assist the Negroes in their negotiations, ... the co-operation between the white and colored locals in the American Tobacco plants is decidedly limited in scope." Northrup, Organized Labor and the Negro at 113. See also R. Marshall, Labor in the South at 217.

47/ "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 443 U.S. at 198 n.1.

shall, Labor in the South at 216-17. While cigarette employment was expanding in mechanized jobs open almost exclusively to whites, black members of the Tobacco Workers Union were laid off with little or no union opposition and were replaced by machines operated by whites. Northrup at 39. As a result of this process, black workers -- who had monopolized employment in the tobacco industry from colonial times to the late 19th century, and who had then held a clear majority of the industry's jobs until the 1930s -- found in 1960 that they held only 25 percent of the jobs. Their sharply reduced share of the jobs, moreover, continued to be rigidly segregated. Id. at 33. Government pressure in the 1960s brought about some changes in overt segregationist policies, but by that time the continuing impact of automation and the declining demand for tobacco

products had severely limited job opport
nities in the industry. Id. at 40-41.[4]

In the seminal case of Quarles
Philip Morris, Inc., 279 F. Supp. 505 (E.
Va. 1968), Judge Butzner reviewed t
history of segregation and racial discrim
nation at a typical southern tobac
company and the use of restrictive depar
mental transfer and seniority practices
perpetuate this history. 279 F. Sup
at 510-14.[49] The court in Quarles fou

48/ For example, in response to pressu
from President Kennedy's Committee on Equ
Employment Opportunity to open up all d
partments to all races, the tobacco co
panies simply tacked their black seniori
lists onto the bottom of the lists for t
white departments, and vice versa. Becau
there were few openings of any kind, th
limited change in form resulted in litt
or no improvement in the substance
black opportunities for upward movemen
Northrup at 40-41.

49/ The practices at Philip Morris we
essentially the same as those followed
other tobacco manufacturers, Northrup
78, including the American Tobacco Compan
id. at 64-66.

that, although there had been no disc
nation in hiring or initial assign
since 1966, restrictive departme
transfer policies -- including forfe
of accrued departmental seniority r
upon transfer -- imposed "restrict
upon the present opportunities for Ne
result[ing] from the racial pattern of
company's employment practices prio
January 1, 1966." 279 F. Supp. at
Based on a review of the legisla
history concerning § 703(h) and Title V
application to pre-Act seniority syst
the court concluded that "Congress did
intend to freeze an entire generatio
Negro employees into discrimina
patterns that existed before the act."
at 516.

The court in Quarles found that
seniority system at Philip Morris had
genesis in the racially discrimina

employment pattern typical of the
industry, and that present dif
in treatment under the system w
result of intentional discrim
against blacks. The court theref
that the seniority system was not
fide system protected by § 703(h).
516-18. Since the system perpetua
discrimination and was not justi
business necessity, it violated Ti
"[T]he restrictive departmental
and seniority provisions of the co
bargaining agreement are inten
unlawful employment practices beca
are superimposed on a departmenta
ture that was organized on a r
segregated basis." Id. at 510. 50/

50/ In Teamsters this Court held
"otherwise neutral, legitimate s
system does not become unlawful und
VII simply because it may perpetu

The record in the present c
strates that the industry-wide
intentional discrimination and s
prevailed at American Tobacco's
in Richmond. See pp. 8-27, sup
the restrictive departmental tra
seniority provisions in Quarles,
of progression in the present
"superimposed on a departmental
that was organized on a racially
basis." Quarles v. Philip Morri
Supp. at 510. The company and
thus seek to apply § 703(h) to

50/ cont'd.

Act discrimination." 431 U.S. a
The Court noted, however, that Q
the cases that followed it were
with Teamsters insofar as they he
seniority system that perpetu
effects of pre-Act discrimination
bona fide if an intent to dis
entered into its very adoption."
at 346 n.28.

which they imposed after the
of Title VII on their own
structure of intentional disc
segregation. It is within th
well as the larger historic
the racial practices of
industry as a whole, that t
language, the legislative his
judicial decisions construing
be considered.

2. The Purpose o
Section 703(h
Narrow Exemptio
VII's Broad
of Discriminato
Practices.

The Civil Rights Act of
first comprehensive federal
ever to address the pervasiv
discrimination against blac
American society. See M. S
Restraints on Racial Discrimi

ployment 8 (1966). Extensi
focused the attention of
adverse social and econom
of discrimination against b
ment and other fields,[51]
House Judiciary Committee i
on the bill which became t
Act of 1964, it clearly
primary objective of th
eliminate the effects of
against black citizens:

> In various regions
> there is discriminatio
> minority groups.
> however, is the discri

51/ See, e.g., Hearings
ment Opportunity Before th
comm. on Labor of the House
tion and Labor, 88th Cong.
12-15, 47-48, 53-55, 61-63
on Civil Rights Before Sub
the House Comm. on the Ju
Cong., 1st Sess. 2300-03
on Equal Employment Opportu
Subcomm. on Employment and
Senate Comm. on Labor and
88th Cong., 1st Sess. 1
426-30, 449-52, 492-94 (196

> Negroes which exi
> Nation. Today, m
> after their for
> Negroes, who make
> of our population
> one or another typ
> not accorded the
> and opportunities
> to be, and must be
> all citizens.
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> No bill can
> to eliminating all
> consequences of ra
> of discriminatio
> ties....
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> It is, howe
> necessary for the
> legislation whi
> provides the means
> most serious typ
> tion....

H.R. Rep. No. 914, 88t
(1963), reprinted in [1
& Ad. News 2391, 2393.

In United Steelwor
Court reviewed the legi
concluded that "Congre
in enacting the prohibi
discrimination in Titl

Rights Act of 1964 wa
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202, quoting 110 Cong
of Sen. Humphrey).
that blacks were la
unskilled and semi-
because of automation
jobs was rapidly decre
the 1940s the relat
black worker had ste
This pattern was espe
the tobacco industry,
were systematically re
ated machines, with
tion from the white-dc
pp. 63-68, supra. Con
nized that, unless
versed, the goal of th
"the integration of b
stream of American soc
achieved. 443 U.S. a

"it was clear to C
the problem [wa
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which have been
them,' 110 Cong. R
Humphrey), and it
Title VII's proh
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addressed." Id. a

This problem
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Steelworkers v. W
quoting 110 Cong.
of Sen. Humphrey

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Bowman Transport
and cases cited
of Washington v.
4628 (1981). T
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definition of
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Washington v.
quoting S. R
Sess. 12 (196

In § 703
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431 U.S. at
Association v
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311-12 (19
Health Insu
U.S. 205,
v. Portlan
425 U.S. 1,
U.S. 54, 65
bitions of

§§ 703(a) and (d), the exception provided by § 703(h) "must ... be read against the background of the legislative history of Title VII and the historical context from which the Act arose," United Steelworkers v. Weber, 443 U.S. at 201, and it must be interpreted in a manner which does not "'bring about an end completely at variance with the purpose of the statute'...." Id. at 202, quoting United States v. Public Utilities Commission, 345 U.S. 295, 315 (1953). In view of the broad approach adopted by Congress, the Court "must ... avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." County of Washington v. Gunther, 49 U.S.L.W. at 4628.

The importance of seniority rights in the modern workplace supports the proper

construction of § 703(h) as a narrow exception which should not be allowed to defeat the fundamental purpose of Title VII. As the Court stated in Franks:

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. ... Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). ... We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." ... "More than any other provision of the collective [-bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms." ...

424 U.S. at 766 (citations omitted). See also Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring

and Promotion, 82 Harv. L. Rev. 1598, 16
07 (1969).

This Court recognized in Franks th
because seniority rights are so importa
the victims of illegal racial discrimi
tion are presumptively entitled to awa
of retroactive seniority which wil
insofar as possible, restore them to
positions they would have held in t
absence of discrimination. Seniori
relief therefore may be denied "'only f
reasons which, if applied generall
would not frustrate the central statut
purposes of eradicating discriminati
throughout the economy and making pers
whole for injuries suffered through p
discrimination.'" 424 U.S. at 77
quoting Albemarle Paper Co. v. Moody,
U.S. 405, 421 (1975). For the same reas
§ 703(h) should be interpreted in a mann
which, while recognizing the intent of C

gress to protect bona fide pre-Act sen
ity systems from liability, does
undermine the fundamental purposes of T
VII. Section 703(h) was not intended t
an instrument for depriving black wor
of the seniority rights which are essen
if they are to achieve their rightful p
in the mainstream of American soci

D. The Policies Underlying Title
Support The Conclusion t
§ 703(h) Does Not Immunize P
Act Seniority Systems Wh
Perpetuate Intentional Discr
nation and Segregation.

Strong public policies support
collective bargaining and equal employ
opportunity. In the National Labor R
tions Act, Congress expressed a nati
labor policy "'encouraging the pract
and procedure of collective bargainin
Emporium Capwell Co. v. Western Addi
Community Organization, 420 U.S. 50,

(1975), quoting 29 U.S.C. § 1
the Civil Rights Act of 1964, "(
indicated that it considered the
against discrimination to be of th
est priority.'" Alexander v. Gard
ver Co., 415 U.S. 36, 47 (1974),
Newman v. Piggie Park Enterprise
390 U.S. 400, 402 (1968).

The resolution of a potential
between these policies depends u
intent of Congress as to which
should prevail in a particular
context. See Alexander v. Gardne
Co., 415 U.S. at 60 n.21. For exa
Trans World Airlines v. Hardison,
there was no evidence of past dis
tion that required a remedy, th
determined that the policies sup
both collective bargaining an
opportunity weighed against the ab
of the seniority rights of some e

in order to accommodate the relig
of others. 432 U.S. at 79 n.12
other hand, in Franks v. Bowman T
tion Co., the Court concluded
congressional policies outlawing
nation and requiring a "make who
outweighed the policy favoring
bargaining. The Court held th
Title VII, the victims of unlawfu
ination ordinarily are entitled
active seniority even though su
diminishes the collectively
seniority rights of other, argu
cent, employees. 424 U.S. at
773-79.

In the factual and historic
presented here, the congression
requiring equal employment op
outweighs any policy which
served by authorizing employers
to adopt new seniority syste

have no business justificat
perpetuate their own intenti
nation.

American Tobacco's F
Virginia branches were op
strictly segregated basis un
in the rest of the industry
assigned to the prefabricatio
while fabrication department
paid higher wages and had b
conditions, were reserved for
pp. 8-11, supra. Although t
overt segregation was modif
racially motivated discrim
tinued. Until 1968, black e
excluded from white jobs
intentionally discriminatory
policies. Under the guise
"interest" in vacancies and
tions" for promotions, th
all-white supervisory force

restrict black employees t
cally "black" jobs. See pp

It was against this b
the company and the union
lines of progression.[52/] Und
tem, when a vacancy occurre
in a line of progression,
who had held a lower job in
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52/ This case does not pre
tion, suggested by the unio
seniority system which mi
protected by § 703(h) but th
after the effective date of
manner which increased empl
nities for minorities.
28-29; see Company Brief at
present case, the post-Act l
sion system did not repla
pre-existing bona fide se
Instead, it replaced an
discriminatory promotional s
which was never protected by
California Brewers Ass'n v
U.S. at 608-09. See Argum
Moreover, the line-of-progr
far from expanding oppo
minorities, perpetuated t
prior intentional discrim
pp. 17-27, supra.

less of their senio
ability, employees out
progression were preclud
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system, superimposed on
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opportunity to advance
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> Most of these jobs
> progression] were
> departments. Sinc
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> fabrication departm
> jobs in most of the
> not advance despit
> In this respect, th
> sion perpetuated t
> discrimination in a
> the formerly segre
> seniority rosters.

(App. 78-79). See p

Thus, the system
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system. The lines of
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Richmond branches hol
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the union, these whit
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jobs at the top of the
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53/ In 1973, there w
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and Richmond branches
ately 585, or 83 perc
employees held jobs
lines of progression.

54/ The highest paid
at both branches are
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155-62).

ployees are now
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Steele v. Lo
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tablished in 1968 were not "designed to break down old patterns of racial segregation and hierarchy," nor were they intended "to eliminate a manifest racial imbalance." Weber, 443 U.S. at 208. To the contrary, the line-of-progression system preserved the favored positions gained by white employees and perpetuated the disadvantages suffered by black employees as a result of decades of overt segregation and intentional discrimination by the company and the union. In effect, the company suggests that, by replacing its

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56/ cont'd.

system to a system which restricted advancement to those within the lines of progression. See pp. 11-27, supra. As is implicit in the union's hypothetical example, the change in the present case was detrimental to the victims of discrimination because it perpetuated the effects of segregated job assignments and intentionally discriminatory promotional policies.

overtly discriminatory system with a facially neutral system which perpetuated the effects of its prior intentional discrimination, it implemented an "affirmative action plan."[57/] In the factual context of this case, the imposition of the unnecessary line-of-progression system is no more deserving of protection from a Title VII challenge than the imposition of a non-job related test or educational requirement for entry into jobs which were

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57/ The company and the union did not argue or present evidence in the courts below that the line-of-progression system was an affirmative action plan. Nor do they describe in their briefs in this Court how the system qualifies as "affirmative action" or, more basically, how the system does not simply perpetuate the effects of intentional discrimination. In Weber the Court stressed "the narrowness of [the] inquiry" regarding affirmative action plans. 443 U.S. at 200. The petitioners' invitation to discuss aspects of affirmative action which are not presented by this case should be declined.

previously reserved for whites. See Gri
v. Duke Power Co., 401 U.S. at 428-

The relevant legislative materia
the prior decisions of this Court, and
history and purpose of Title VII
demonstrate that § 703(h) was not inter
to immunize post-Act seniority syst
which perpetuate intentional discrimi
tion. In the circumstances of this ca
the Fourth Circuit correctly held that
policy favoring collectively bargai
seniority systems must give way to
paramount policy mandating equal opp
tunity in employment. Its judgment sho
be affirmed.

II. THE LINES OF PROGRESSION ARE PART OF A "SENIORITY SYST WITHIN THE MEANING OF § 703(

The narrow exemption provided
§ 703(h) applies to "bona fide senior

... system[s]." 42 U.S.C. § 2000e-
The majority of the panel below held
the lines of progression are not part
"seniority system" and therefore ar
protected by § 703(h). (App. 116).
rehearing, the majority of the en
court recognized that there was "cons
able support" for this "possible alt
tive basis for decision," but they fou
unnecessary to decide the question be
of their holding that § 703(h) has
application to post-Title VII seni
systems which perpetuate prior discri
tion. (App. 142-43 n.3). The membe
the panel majority concurred in this
of the en banc court's opinion but
reaffirmed their prior panel opi
(App. 155). Respondents submit that
alternative basis for the judgment bel
dispositive.

As the Court stated in C
Brewers Association v. Bryant, "T
does not define the term 'senio
tem,' and no comprehensive defi
the phrase emerges from the le
history of § 703(h)." 444 U.S
(footnote omitted). The Court,
has identified certain "core co
'seniority'" as that term is
§ 703(h):

> In the area of la
> tions, "seniority" i
> that connotes length o
> ment. A "seniority sys
> scheme that, alone or
> with non-"seniority" c
> allots to employees eve
> ing employment rights
> fits as their relevant l
> pertinent employment i
> Unlike other methods of
> ing employment benef
> opportunities, such as s
> evaluations or educati
> quirements, the principa
> of any and every "s
> system" is that pref
> treatment is dispense
> basis of some measure
> served in employment.

Id. at 605-06 (footnotes omitted

As the Court noted in Tea
niority may be "measured in a
ways, including length of tim
employer, in a particular pl
department, in a job, or in
progression ...." 431 U.S. at
Thus, a system which allocate
benefits on the basis of time
a line of progression is a "sen
tem" which may be protected by §
The lines of progression at i
however, do not allocate jobs
on the basis of any measure of
with the employer. To the cont
lines insulate the highest pa
both branches from the operat

58/ For a decision applying § 7
true line-of-progression seniori
see Myers v. Gilman Paper Co., 2
468 (S.D. Ga. 1981).

seniority system. When a va
one of the top jobs in a li
sion, only employees who hav
job in that line are eligibl
vacancy. (App. 21-22). I
served in the line of progre
factor. Neither is length of
the lower job. Instead, the
gression impose a requirement
a lower job. This prior se
ment operates as a prerequ
application of the seniority
the limited group of employe
this prerequisite and are th
ble to bid on a vacancy, br
is applied to determine t
bidder. Only the fact of
lower job is of any importan
of time served in either th
the line of progression h

whatsoever. See p. 21 n.

The lines of proc
present case therefore ha
with "seniority" as that
in California Brewers.
Court held that a thres
of 45 weeks of service a
ployee for entry into a p
seniority track was a
"seniority system" withi
§ 703(h). The Court st

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Moreover,
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Agreement, whic
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benefits.

444 U.S. at 609-10.

Here, by contrast,
on a job at the top of
sion has nothing to do
seniority "in a part
department, in a job
progression...." Team
355 n.41. Instead, el
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California Brewers, 44
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609. As the Court re

Brewers, such non-s

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444 U.S. at 606 n.13.

Moreover, the el

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California Brewer
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App. 158-62).

60/ In 1973, th
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444 U.S. at 608-

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(App. 108).

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CONCLUSION

The judgment of the Fourth Circuit *en banc* should be affirmed.

Respectfully submitted,

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